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IN THE

Supreme Court of the United States

October Term, 1947
No. 259

ARNOLD BERNSTEIN, also known as Arnold M. Bernstein,

Petitioner,

against

N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, also known as Holland-America Line,

Respondent.

PETITION OF ARNOLD BERNSTEIN FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION OF ARNOLD BERNSTEIN FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Arnold Bernstein, respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit made herein May 23, 1947 (p. 85, fol. 87; p. 89, fol. 93). A petition for rehearing was made and filed under Rule 28 of the said Circuit on June 6, 1947 (pp. 90-95) and denied on June 9, 1947 (p. 96, fols. 101-103).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347). The decision of the Circuit Court of Appeals is ~~not yet~~ officially reported. 161 F. (2d) 733.

Questions Presented

1. Is the decision of this Court in *Catlin* v. *United States,* 324 U. S. 229, applicable to the order of the District Court herein, permitting the defendant to serve a third-party complaint, and to the appeal to the United States Circuit Court of Appeals, Second Circuit, therefrom; this action not being one relating in any way to the condemnation of property by eminent domain?

2. Is the sentence of the opinion in *Catlin* v. *United States,* at page 233, reading: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." intended to affect the authority of the decisions of this court in *Ray* v. *Law,* 3 Cranch 179, and subsequent cases, hereinafter cited, relating to appeals from final decisions of the District Court of the United States, or is it intended to apply to appeals in condemnation proceedings only?

3. Is the said sentence in *Catlin* v. *United States, supra,* intended to change or modify in any way the rule enunciated by this Court in *Forgay* v. *Conrad,* 6 How. 201, at page 203, as follows:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of

> the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.",

or to change or modify the rule laid down by the decisions of this court which have followed, with slight modifications, *Ray* v. *Law, supra,* and *Forgay* v. *Conrad, supra.*

Statutes Involved

Section 22, Ch. 20, 1st Session, 1st Congress, approved September 24, 1789, in part as follows:

> "* * * that final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court. * * *"

United States Code, Title 28, Sec. 225 (Judicial Code, sec. 128 as amended) in part as follows:

> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Summary and Short Statement of the Matter Involved

In dismissing the appeal for lack of jurisdiction, and declining to consider, therefore, the grounds (under the decisions) on which the appeal should be heard and the order of the District Court reversed, either as of right or as a matter of discretion, the Circuit Court of Appeals disregarded the overwhelming authority of the cases herein referred to.

The question came before the Circuit Court of Appeals on a motion to dismiss an appeal from an order bringing into the action a third-party defendant, under the provisions of Rule 14(a) of the Federal Rules of Civil Procedure. The plaintiff, a citizen of the United States and of the State of New York, brought the action against the defendant, a foreign corporation. The defendant moved for an order bringing in the Chemical Bank & Trust Company, a New York corporation, as a third-party defendant. In an action where the plaintiff is also a citizen of the State of New York this would compel litigation between residents of the same state, in violation of the constitutional and statutory provisions (U. S. Constitution, Art. 3, Sec. 2; Judicial Code, Sec. 24 amended; U. S. C. Title 28, Sec. 41(1), as recently construed by this Court in *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, rehearing denied 314 U. S. 714), and the plaintiff upon that ground opposed the motion.

The District Court granted the motion, saying (Rec., p. 76, fol. 228):

> "If a defendant's motion under Rule 14 to bring in a third-party defendant is *solely for the purpose of offering him to the plaintiff as a party defendant*

> who may also be liable to the plaintiff for all or part of the plaintiff's claim against the original defendant, the third-party defendant must be a citizen of a state other than plaintiff's. (***Friend*** **v.** ***Middle Atlantic Transportation Co., et al.,*** **153 F. 2d 778.) Any judgment recovered by a plaintiff against a third-party defendant of the same citizenship as plaintiff is void because of lack of jurisdiction of the Federal Court over such claim, if the claim of plaintiff against the third-party defendant *is based on a state created right* and does not involve a Federal question. That is what the Circuit Court of Appeals, Second Circuit, held in the *Friend* case (*supra*).'' (Italics supplied.)**

The plaintiff appealed from the order and the defendant moved to dismiss the appeal upon the ground that the order was not a final order. The Circuit Court of Appeals granted the motion (p. 85, fol. 87; p. 89, fol. 93). Its complete opinion (written on the back of the motion papers) is, "Appeal dismissed on authority of *Catlin* v. *United States*, 324 U. S. 229'' (p. 85, fol. 87). The instant case does not involve proceedings in condemnation in any way. *Catlin* v. *United States* relates wholly to appeals in condemnation proceedings.

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in holding that the order appealed from was not appealable.

2. The Circuit Court of Appeals erred in applying the decision of this court in *Catlin* v. *United States*, 324 U. S. 229, or any portions of the opinion therein, to a case which does not involve condemnation proceedings.

The Reasons Relied On for the Allowance of the Writ

In *Magnum Import Co.* v. *Coty*, 262 U. S. 159 at p. 163, Chief Justice Taft stated the purposes for granting a writ of certiorari as follows:

> "• • • The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort."

Both of these purposes exist here. The decision which it is sought to review is contrary to many prior decisions in this court and in the several Circuit Courts of Appeal, including the Second Circuit. Uniformity of decisions can be obtained if the writ herein applied for is granted and a decision thereafter made by this Court.

As it is the first case, on this question, involving Section 14(a) of the new Federal Rules of Civil Procedure, it involves also a question of importance which it is in the public interest to have decided by this Court of last resort.

The decision below is one of the only two decisions we have found (the other being *Baltimore & O. R. Co.* v. *United Fuel Gas Co.*, 154 F. 2d 545, Fourth Circuit), construing either the words "final decrees and judgments" or the words "final decisions" in a strict and technical sense (except in criminal cases, ordinary interlocutory orders, and condemnation proceedings), since this Court in *Ray* v. *Law*, 3 Cranch 179, by the procedure there followed, construed the words

"final judgments and decrees" more liberally, and since this Court in *Forgay* v. *Conrad*, 6 Howard 201, 204, announced that the more liberal rule heretofore quoted from that case had always been followed by this Court. This more liberal construction has been placed upon the words in 101 cases, and includes decisions in the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th and 10th circuits. As the cases are so numerous, we list only the cases in this court and those in the Second Circuit, and quote from one case in this court and call attention to one holding (in the Second Circuit, two) in each of the nine circuits which have followed the rule.

Those in this court which follow *Ray* v. *Law*, *supra*; or *Forgay* v. *Conrad*, *supra*, or *Thomson* v. *Dean*, 7 Wall. 342, or more than one of them, are:

Whiting et al. v. *The Bank of the United States*, 38 U. S. 6, 15;
Bronson v. *La Crosse & M. R. R. Co., et al.*, 67 U. S. 524, 531;
R. R. Co. v. *Bradleys*, 74 U. S. 575, 577;
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Hill v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52, 54;
Mclish v. *Roff*, 141 U. S. 661, 666;
La Bourgogne, 210 U. S. 95, 113;
North Carolina R. R. v. *Story*, 268 U. S. 288, 291;

Gulf Refining Co. v. *United States,* 269 U. S. 125, 136;
Clark v. *Williard,* 292 U. S. 112, 119;
Knox National Farm loan Ass'n v. *Phillips,* 300 U. S. 194, 198;
Radio Station WOW v. *Johnson,* 326 U. S. 120, 125.

In addition to the foregoing, there are a number of cases in this Court recognizing the principle of liberal construction above referred to, but distinguishing the case then under consideration on the facts.

Those cases in the Second Circuit which follow the rule in *Forgay* v. *Conrad, supra; Ray* v. *Law, supra,* or *Thomson* v. *Dean, supra,* are:

The Alert, 61 F. 113, 115;
Tuttle v. *Claflin,* 66 F. 7, 8;
Gay v. *Hudson River Electric Power Co.,* 184 F. 689;
Central Trust Co. v. *Chicago, R. I. & P. R. Co.,* 218 F. 336;
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Am. Eng. Co. v. *Metropolitan,* 275 F. 40, 42;
Am. Brake Shoe v. *N. Y. Rys. Co.,* 282 F. 523;
Sullivan v. *Associated Billposters and Distributors,* 6 F. 2d 1000, 1002;
United States v. *Radice,* 40 F. 2d 445;
Collins v. *Metro-Goldwyn Pictures Corporation,* 106 F. 2d 83, 85;
United States v. *243.22 Acres of Land,* 129 F. 2d 678, 681.

No Circuit Court of Appeals cases except this one and *Baltimore & O. R. Co.* v. *United Fuel Gas Co.*, 154 F. 2d 545, dispute or fail to follow the rule laid down by this Court in the *Ray, Forgay* and *Thomson* cases, *supra.*

In *United States* v. *River Rouge Co.*, 269 U. S. 411, 414, argued in 1924 and decided in 1926, the last case decided in this Court on the law as it was before the amendments of February 13, 1925, and while appellate procedure was by writs of error or appeal, this Court said:

> "* * * While the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. * * *"

The quotations from and references to the ten Circuits follow:

1st Circuit:

Rubert Hermanos, Inc. v. *People of Puerto Rico,* 118 F. 2d 752, page 757:

> "A 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particuar phases of the litigation, reserving other matters for future determination. See *Knox National Farm Loan Ass'n* v. *Phillips,* 300 U. S. 194, 197, 198, 57 S. Ct. 418, 81 L. Ed. 599, 108 A. L. R. 738; *Trustees* v. *Greenough,* 105 U. S. 527, 26 L. Ed. 1157; *Gay* v. *Hudson River*

Electric Power Co., 2 Cir., 184 F. 689; *Dant & Russell* v. *J. D. Halstead Lumber Co.*, 9 Cir., 103 F. 2d 306. The words 'final decisions,' like the equivalent 'final judgments and decrees' in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given a liberal and reasonable construction. *Forgay* v. *Conrad*, 6 How. 201, 203, 12 L. Ed. 404; *City of Eau Claire* v. *Payson*, 7 Cir., 107 F. 552, 557."

2nd Circuit:

Gay v. *Hudson River Electric Power Co.*, 184 Fed. 689, pages 692-693:

> "* * * The question whether such an order does or does not 'invade the established rights of the petitioners contrary to law, in such a manner that they can have no relief except by an appeal,' is certainly presented upon the record; and for that reason the cause is within the principle laid down in *Farmers' Loan & Trust Company*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656."

Also, *Odell* v. *H. Batterman Co.*, 223 Fed. 292, page 295:

> "* * * Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal."

It will be noted from the list of decisions hereinbefore set out that the Second Circuit Court of Appeals had followed the decisions in *Gay* v. *Hudson River Electric Power Co.*, *supra*, and *Odell* v. *H. Batterman Co.*, *supra*, consistently in different cases until the contrary decision in this case.

3rd Circuit:

In the case of *Bank of Taiwan* v. *Gorgas-Pierie Mfg. Co.*, 273 F. 660, the court said at page 661:

> "This appeal is from an order of interpleader. The plaintiff-appellee moves to dismiss the appeal on the ground that the order is not final. The order aligns the parties, prescribes the method of procedure, and—as it will presently be seen—finally denies to one of the parties the right to assert a contract obligation against another. We regard the order as final within the meaning of the statute, and, accordingly, deny the motion to dismiss the appeal. *Killian* v. *Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; *Standley* v. *Roberts*, 59 Fed. 836, 8 C. C. A. 305; *Hayward & Clark* v. *McDonald*, 192 Fed. 890, 113 C. C. A. 368; *McNamara* v. *Provident Sav. Soc.*, 114 Fed. 910, 52 C. C. A. 530; *Huxley* v. *Pennsylvania Warehousing & Safe Deposit Co.*, 184 Fed. (C. C. A. 3d) 705, 106 C. C. A. 659."

and, at pages 663-664:

> "* * * We do not regard it to be a matter of legal indifference whether the Bank of Taiwan shall interplead with the party whose obligation it holds or with the party with which it has never had dealings. *American Steel Co.* v. *Irving National Bank* (C. C. A.) 226 Fed. 41, 43. We can conceive certain advantages of procedure and of evidence available to it in enforcing payment of the draft against the bank on whose authority it was drawn, of which it would be deprived if it were forced to litigate the contract between the Gorgas-Pierie Company and the Nanyo Company to which it was neither a party nor a privy. *American Steel Co.* v. *Irving National*

Bank, supra; In Matter of Agra and Masterman's Bank, L. R. 1867 Ch. App. 391; *Frey & Son, Inc.,* v. *Sherburne Co.,* supra."

4th Circuit:

In *East Coast Cedar Co.* v. *People's Bank of Buffalo, N. Y.,* 111 F. 446, certiorari denied 184 U. S. 699, the court cited and followed *Thomson* v. *Dean, supra,* and *Forgay* v. *Conrad, supra.*

5th Circuit:

Vicksburg, S. & P. Ry. Co. v. *Schaff,* 5 F. 2d 610, at page 611, cites and follows *Credits Commutation Co.* v. *U. S.,* 177 U. S. 311; *Central Trust Co.* v. *Chicago R.I. & P.R. Co.* (2nd Circ.), *supra; U. S.* v. *Northwestern Development Co.,* 203 F. 960 (9th Circ.) and *Western Union Tel. Co.* v. *U. S. & Mex. Tr. Co.,* 221 F. 545 (8th Circ.).

7th Circuit:

In *City of Eau Claire* v. *Payson, et al.,* 107 F. 552, the court said at page 557:

> "The supreme court has not placed upon the words 'final decree', respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction. *Forgay* v. *Conrad,* 6 How. 201 * * * *Williams* v. *Morgan,* 111 U. S. 684, 699, * * * *In re Farmers' Loan & Trust Co.,* 129 U. S. 206, * * *."

8th Circuit:

In *Rector* v. *United States,* 20 F. 2d 845, at p. 872, the court said:

> " * * * It is certain that an order is final and appealable if it is of a character which settles substantial rights; which makes no reservation as to its effect; which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree in the main litigation."

A reading of the opinion of Presiding Judge Kimbrough Stone there shows that he had, in that case, reviewed approximately fifty decisions.

9th Circuit:

Bedgisoff v. *Cushman,* 12 F. 2d 667, recognizes *Gay* v. *Hudson River Electric Power Co., supra; Central Trust Co* v. *Chicago R.I. & P.R. Co., supra,* and *Odell* v. *H. Batterman Co., supra,* as correct, but not applicable, decisions. They are all decisions of the Circuit Court of Appeals for the Second Circuit. However, the court did review the order made in the discretion of the court below; found that the discretion of the court below had been exercised arbitrarily, and issued a writ of mandamus requiring the case to be set for trial before a specified date.

10th Circuit:

Kasishke v. *Baker,* 144 F. 2d 384, at p. 386, cites *Forgay* v. *Conrad, supra; Thomson* v. *Dean, supra; Rubert Hermanos Inc.* v. *People of Puerto Rico, supra,* and several other cases.

Supporting Brief

The court below has plainly misapplied the decision of this Court in *Catlin* v. *United States, supra.*

The dismissal of the appeal here is also erroneous under the construction placed on the words "final judgments and decrees" and their equivalent "final decisions" by repeated decisions of this Court.

> "The words: 'final decision in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction." (*Ex Parte Tiffany,* 252 U. S. 32, at page 36.)

It is also erroneous under the decisions in nine of the ten circuits.

The case, as the record shows, is an important one, based on a claim for damages amounting to millions of dollars.

Substantive rights of the plaintiff under both the Fifth and Seventh amendments to the Constitution are involved.

Every one of the grounds cited by Judge Kimbrough Stone (in *Rector* v. *United States, supra,* page 12), after an exhaustive study of the decisions, as making an order final and appealable, is present here: the order is of a character which settles substantial rights; it makes no reservation as to its effect; it is designed to be operative in a way affecting such rights at once and before and irrespective of the final decree in the main litigation.

It cannot be doubted that the bringing into a case, triable by a jury under the Seventh Amendment to the Con-

stitution, of a corporate third-party defendant of the same state citizenship as the plaintiff, affects substantial rights in the way described by Judge Kimbrough Stone.

An interesting case is *Bank of Taiwan* v. *Gorgas-Pierie Mfg. Co., supra,* in which the Third Circuit Court of Appeals, reversing the order below, stated (see quotations, *supra,* page 11), that such order "aligns the parties, prescribes the method of procedure, and * * * finally denies to one of the parties the right to assert a contract obligation against another". Here the order below "aligns the parties" and "prescribes the method of procedure", and finally requires the plaintiff to accept as a party to the suit a third-party which holds none of his property, against which he asserts no claim, with which he "has never had dealings", and to the dealings of which with the defendant he "was neither a party nor a privy"; all of which—as in the *Bank of Taiwan* case—is not "a matter of legal indifference" but, on the contrary, deprives the plaintiff of "certain advantages of procedure and of evidence" that go to the essence of his remedy.

As to the remaining questions and errors specified, it is sufficient to point out that the decision below is contrary to forty decisions in this Court and at least sixty-one decisions in the Circuit Courts of Appeals, twelve of them heretofore made in the Second Circuit itself. Apparently in the case at bar the Circuit Court of Appeals for the Second Circuit has not only reversed its own prior decisions but has made a decision contrary to the decisions in nine of the other circuits. Which line of decisions it will follow in future cases is uncertain. There should be uniformity of decisions and that can be attained only through the action of this Court of last resort.

In addition, considerations presented under the captions "Questions Presented", "Specification of Errors to be Urged" and "The Reasons Relied on for the Allowance of the Writ", are, each in itself, statements of reasons why this writ should be granted.

Incidentally, the case of *St. Louis I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U. S. 24, cited in *Catlin* v. *U. S.*, *supra*, differs greatly on its facts from the case here. There the motion to dismiss the appeal was denied.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 259

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PETITIONER'S REPLY BRIEF

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5 Cyclopedia of Federal Procedure, 575, Sec. 1869 3

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IN THE

Supreme Court of the United States

October Term, 1947

No. 259

ARNOLD BERNSTEIN, also known as ARNOLD M. BERNSTEIN,

Petitioner,

against

N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, also known as Holland-America Line,

Respondent.

PETITIONER'S REPLY BRIEF

Nothing in the answering brief of the respondent herein affects two facts: First, the court below plainly misapplied the decision of this Court in *Catlin* v. *United States,* 324 U. S. 229 (see petition, pp. 2, 5 and 14). Second, the decision of the court below in this case conflicts with decisions in this Court (petition, pp. 7 and 8); in the Second Circuit (p. 8); and also in the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits (petition, pp. 9-13 inclusive).

The statement in the brief of the respondent, at page 1, that "The decision of the Circuit Court of Appeals dismissing the appeal does not present any question whatever of diversity amongst the decisions of the various Circuits or

any unusual or doubtful question of procedure," is astounding. The petition states (p. 7) that 101 cases have been found conflicting with the decision of the court below in this case, some of them in this Court, the majority in the Circuit Courts. The petition quotes (pp. 9-13) from 10 cases in the different Circuits. The Circuit Court of Appeals for the Second Circuit in *United States* v. *243.22 Acres of Land,* 129 F. 2d 678, at page 680, itself refers to the conflict in decisions and describes the word "final" as "slithery". *Baltimore & Ohio Railroad Company* v. *United Fuel Gas Company,* 154 Fed. 2d 545, also refers, at page 547, column one, to the unsatisfactory state of the decisions on this question.

On page 2 of respondent's brief petitioner is described simply as "a stockholder in a German corporation", omitting the fact that he is a citizen of the United States, a resident of the State of New York (R. 20), and therefore a citizen of the same state as the proposed third-party defendant, Chemical Bank & Trust Company, a New York corporation.

The sentence near the bottom of page 2 of respondent's brief, "No attempt was made to make the Bank a co-defendant on the basis of liability to the plaintiff", is misleading. The defendant, as third-party complainant, in its summons requires the Chemical Bank & Trust Company, the proposed third-party defendant, to serve on the attorneys for the plaintiff "an answer to the complaint of the plaintiff, a copy of which is herewith served upon you" (R. 10, 11). The summons follows form 22 attached to the Federal Rules of Civil Procedure, and Rule 14(a) itself requires the third-party defendant to answer the com-

plaint of the plaintiff. The amended complaint of the plaintiff is also Exhibit "A" attached to the notice of motion (R. 12-19). These requirements are not altered by lower court rulings that litigation between the plaintiff and third party defendant cannot occur unless the plaintiff amends his complaint.

At page 3, the respondent's brief says: "The petitioner does not cite any decisions holding or suggesting that an order permitting the impleader of a third party is appealable as a final decision." The petition quotes (pp. 11 and 12) from the opinion in the case of *Bank of Taiwan* v. *Gorgas-Pierie Mfg. Co.*, 273 F. 660, 661 (C. C. A. 3d). The first sentence of the quotation is, "This appeal is from an order of interpleader," and the holding of the Third Circuit on this point is "We regard the order as final within the meaning of the statute, and, accordingly, deny the motion to dismiss the appeal." There is no difference in principle between an impleader and an interpleader. As stated in the petition (p. 15), the order here has precisely the same elements of finality as the order in the *Bank of Taiwan* case.

This Court has held many times that while textbook citations are valuable, and sometimes highly valuable, they are not to be considered as controlling. This applies to the quotation on page 3 of respondent's brief from 1 *Moore's Federal Practice,* page 749. The attention of the Court should be called to the following from 5 *Cyclopedia of Federal Procedure,* 575, sec. 1869: "Though it would seem that orders denying motions to bring in third-party defendants are not appealable because not final, there is authority for appealing

in such cases." Thus, there is on this score a conflict even between text book writers.

On page 4 and 5, the respondent's brief discusses the decision of this Court in *Catlin* v. *United States,* 324 U. S. 229, quoting portions commencing on page 233 thereof and concluding on page 236.* A discussion of the decision in the *Catlin* case was included in petitioner's motion for a rehearing and is therefore before this Court (R. 91-94). We shall not repeat here what we said there. We call the attention of the Court to it here, however, first, because the reference to it in the last three lines on page 1 of the petition is not specific, and second, because we did not call attention, as possibly we should have, to the fact that there are two qualifications in the language of the decision in the *Catlin* case itself. The first is the use of the word "generally" on page 233. This leaves it open to being said that while what

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* The case of *St. Louis I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28, cited in the *Catlin* case at page 233 involved a motion to dismiss an appeal from a decree asserted not to be final. The Court analyzed the complaint, stated what it contained and said that the decree based thereon *was a final decision and therefore appealable, and denied the motion.* If the decision had been that the decree below was not final and therefore the appeal had been dismissed, the situation would have been different. Furthermore, *non constat* but that an order relating to a complaint containing fewer or other statements of fact might also have warranted a decision that it was final and therefore appealable. It is what the *order* does that matters.

The decision of this Court in *United States* v. *River Rouge Co.,* 269 U. S. 411, 414, cited in our petition on page 9, represents a more complete view. The *River Rouge* case was *sub judice* in this Court for the better part of two years and appears to have been thoroughly considered.

is said on that subject may be a correct statement generally, it was not intended as a reversal of the rule in *Forgay* v. *Conrad* (6 How. 201).

The other qualification commences at the precise point in the *Catlin* case where the respondent's brief ends its quotation therefrom, and is as follows:

> "Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner. As will appear, we think such a remedy is available in this case."

The situation here is very different. If the order of the District Court in this case is allowed to stand, the substantive right of the plaintiff to a common law trial by jury, given him by the Seventh Amendment, will be seriously impaired. That right entitles the plaintiff to a jury trial of the issues presented by his pleading and those of the defendant unimpaired by the trial of any separate issue between defendants from which the plaintiff is debarred by the constitutional provision preventing litigation in the United States courts between citizens of the same state where no other Federal ground of jurisdiction appears. If the order of the District Court is permitted to stand, a situation will be created where the defendant, as third-party complainant will litigate (before the same jury as tries the issues between the plaintiff and the defendant) with the Chemical Bank & Trust Company, a citizen of the State of New York. Plaintiff can take no part in this second litigation no matter what

the defendant, as third-party complainant, or the Bank, as third-party defendant, do or say. He cannot even make an objection. This is not a question that "may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner", as the impairment of plaintiff's constitutional right of trial by jury becomes an irreparable injury once it is permitted.

The opinion in the *Catlin* case clearly relates to condemnation proceedings only. Under note 11 at 324 U. S. page 235, it quotes Rule 81(a)(7), limiting the application of the Rules of Civil Procedure in proceedings for condemnation of property under the power of eminent domain. In addition, specific reference to condemnation proceedings is made on nearly every page. On page 232, it is pointed out that certiorari was granted "in order to resolve conflict upon this question among the several Circuit Courts of Appeal." A reading of the opinions in the cases listed in note 6 on page 232 shows that there was a complete conflict of decisions which was resolved in favor of the decision in the Circuit Court of Appeals for the Seventh Circuit (p. 232) and that all of the cases cited in note 6 related to condemnation of real property.

Another amazing statement (pp. 4 and 5 of respondent's brief) is that the decisions in *Ray* v. *Law*, 3 Cranch. 179, *Forgay* v. *Conrad, supra*, and *Thomson* v. *Dean*, 7 Wall. 342, have nothing to do with the case because "they were all decisions where the appeals were decrees deciding the right to property in contest, entitling the plaintiff to have the decree carried immediately into execution and only leaving

to be adjusted accounts between the parties pursuant to the decree". The rule first followed by Chief Justice Marshall in *Ray* v. *Law, supra,* and put into words by Chief Justice Taney in *Forgay* v. *Conrad, supra,* is simply that (petition, p. 3):

> "this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature."

It is in no way limited to "decrees deciding the right to property in contest, entitling the plaintiff to have the decree carried immediately into execution and only leaving to be adjusted accounts between the parties pursuant to the decree".

What the rule relates to is not the subject matter of any particular cause of action. "A more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature" is to be applied to the words "final decrees", regardless of the character of the action. This Court also so held in *United States* v. *River Rouge Co.,* 269 U. S. 411, 414, quoted at page 9 of the petition, and also in *Rector* v. *United States,* 20 F. 2d 845, 872, quoted in the petition at page 13.

As to the statement on page 5 of respondent's brief, "It has frequently been held that an order adding parties to an action is not a final order and is not immediately appealable", two things are to be said: First, this is not an or-

dinary order adding parties plaintiff or defendant in an action in which there are complicated issues and conflicting rights. The motion here to bring in the third-party defendant is one brought under that provision of Rule 14(a) of the Federal Civil Rules permitting the defendant to move on notice to the plaintiff "for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to plaintiff for all or part of the plaintiff's claim against him". None of the decisions cited by the respondent have anything to do with motions made under that Rule.

Second, the cases cited do not thoroughly uphold the text. The decision in *Kummer* v. *United States,* 148 F. (2d) 191 (C. C. A. 6, 1945), was affected by the provisions of section 445 of the War Risk Insurance Act as amended. *U. S.* v. *Weekly Publications,* 144 F. (2d) 186 (C. C. A. 2), was an order permitting a *temporary* intervention under a special act, the Informers Act. It did not come under usual rules. In *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282, 290, the opinion begins (p. 231), "Two important questions are presented by these petitions". After these important questions have been disposed of in the opinion, the decision below reversed, and the case remanded, the opinion states, without argument, that other orders were interlocutory and not appealable, had not been considered on their merits and if "ultimately there is an appeal from a final decree the correctness of these orders may be examined" (pp. 290, 291). The decision went no further. The last cited case under this heading, *Central California Canneries* v. *Dunkley Co.,* 282 Fed. 406, 410 (C. C. A. 9), holds that the order there adding a new party plaintiff was not a final order and therefore not appealable. It was a rather complicated patent case.

As to the cases cited at the bottom of page 5 and on page 6 of respondent's brief, with those of them which hold that an order granting a new trial is interlocutory and not appealable, we are inclined to agree. None of them, except *McLish* v. *Roff*, 141 U. S. 661, refers to either *Ray* v. *Law, supra, or Forgay* v. *Conrad, supra,* or *Thomson* v. *Dean, supra.* None of them with the possible exception of *McLish* v. *Roff, supra,* has anything to do with anything involved in this case. That case, decided in 1891, construed a section of the statute creating the Circuit Courts of Appeals. While it cites *Forgay* v. *Conrad* as authority for a portion of the decision we regard the decision as a whole as overruled by the more recent decisions of this Court such as *United States* v. *River Rouge Co., supra,* already referred to. *United States* v. *General Motors Corporation,* 323 U. S. 373 and *Land* v. *Dollar,* 67 S. Ct. 1009, have unquestionably overruled that portion of the decision which held that even the omission of the word "final" from the 1891 statute would not permit the Circuit Courts of Appeals to consider decisions which were not final in the strict sense of the word. That was not the construction put on the word "final" in *Forgay* v. *Conrad, supra,* and followed by the cases referred to in the petition.

CONCLUSION

The petition for a writ of certiorari should be granted as prayed for.

William S. Bennet,
Victor House,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 259.

ARNOLD BERNSTEIN, also known as Arnold M. Bernstein,

Petitioner,

—against—

N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, also known as Holland-America Line,

Respondent.

BRIEF FOR RESPONDENT, N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, ALSO KNOWN AS HOLLAND-AMERICA LINE, IN OPPOSITION TO PETITION FOR CERTIORARI.

ROSCOE H. HUPPER,
Attorney for Respondent, N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, also known as Holland-America Line.

JOHN L. GALEY,
Of Counsel.

New York, N. Y., September 6, 1947.

THE COURT PRESS, N. Y. C.

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IN THE

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BRIEF FOR RESPONDENT, N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, ALSO KNOWN AS HOLLAND-AMERICA LINE, IN OPPOSITION TO PETITION FOR CERTIORARI

The only question presented by the decision of the Circuit Court of Appeals is whether that Court had jurisdiction to entertain an appeal by the plaintiff from an order of the District Court under Rule 14(a) of the U. S. Rules of Civil Procedure, permitting the defendant to implead a third party pursuant to an obligation to indemnify the defendant.

The decision of the Circuit Court of Appeals dismissing the appeal does not present any question whatever of diversity amongst the decisions of the various Circuits or any unusual or doubtful question of procedure.

The order appealed from was plainly not a final decision within the meaning of Section 128(a) of the Judicial Code (28 U. S. C. Sec. 225).

The plaintiff, a stockholder in a German corporation (assuming that he had the right as such to bring a suit in the right of the corporation but for his personal benefit), sued the defendant, a Dutch corporation, for conversion of two ships and other property of the German corporation alleging that they came into the possession of the defendant after the plaintiff had assigned his stock in the German corporation to a third person under duress of which plaintiff should have had knowledge. Plaintiff also in other causes of action sued for personal recovery of the ships and property or their value in case they could not be delivered, for damages for their detention by defendant, and for money had and received by the defendant by way of insurance on one of the vessels and the alleged sales proceeds of the other.

The defendant moved for leave under Rule 14(a) of the Rules of Civil Procedure, to make Chemical Bank & Trust Company, a New York corporation, a third party, alleging in substance that the Bank had taken the vessels in consideration of the discharge of the indebtedness of the German corporation to the Bank, had then transferred the vessels to the defendant and, in doing so, had warranted the title to the vessels and its power to convey them, had warranted quiet possession thereof to the defendant and had represented to the defendant that the persons making the conveyances in behalf of the corporation had authority to do so.

The third party complaint charged the Bank only with liability to the defendant. No attempt was made to make the Bank a co-defendant on the basis of liability to the plaintiff.

The motion for leave to implead the Bank was granted over the plaintiff's opposition and the plain-

tiff thereupon appealed to the Circuit Court of Appeals. A motion by the defendant to dismiss the appeal on the ground that the order of the District Court was not a "final decision" under Section 128(a) of the Judicial Code (28 U. S. C. §225(a)), was granted by the Circuit Court of Appeals. The plaintiff thereupon filed the present petition. The case has not yet been tried.

The petitioner does not cite any decisions holding or suggesting that an order permitting the impleader of a third party is appealable as a final decision. The following passage from *1 Moore's Federal Practice* (p. 749) has, so far as we can ascertain, never been questioned:

> "Where the defendant's motion to implead a third-party is denied, the order would not be appealable, since Rule 14 places the grant or denial of such a motion in the discretion of the court. Even if an abuse of discretion could conceivably be shown, still the order denying impleader would not be appealable, inasmuch as it does not finally dispose of any rights of the defendant. *If the defendant's motion to implead a third party was granted, over the plaintiff's objection, the plaintiff could not appeal from such an order since it is not a final order in any sense.*" (Emphasis ours.)

The decision in *Catlin* v. *United States,* 324 U. S. 229, referred to in the brief opinion of the Circuit Court of Appeals, like the present case, involved an application of Section 128 of the Judicial Code. The appeal there was from a judgment in a condemnation proceeding decreeing that title to property of a pri-

vate person vested in the United States upon the filing of a Declaration of Taking by the Secretary of War under the Declaration of Taking Act of February 26, 1931. This Court, in affirming the decision below dismissing the appeal on the ground that the judgment was not a final decision, said:

> "Their right to appeal rests upon §128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28. * * * The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge Co.,* 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals" (pp. 233-4).
>
> * * * *
>
> "* * * But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. *Cf. Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21. See also *Dieckmann* v. *United States,* 88 F. 2d 902" (p. 236).

The decisions in *Ray* v. *Law,* 3 Cranch 179; *Forgay* v. *Conrad,* 6 How. 201 and *Thomson* v. *Dean,* 7 Wall. 342, stressed in petitioner's brief, have absolutely nothing to do with the case. They were all decisions where the appeals were from decrees deciding the

right to property in contest, entitling the plaintiff to have the decree carried immediately into execution and only leaving to be adjusted accounts between the parties pursuant to the decree.

The numerous decisions in the various Circuits dealing with the question as to what constitutes a final decision fully support the decision of the Circuit Court of Appeals.

It has frequently been held that an order adding parties to an action is not a final order and is not immediately appealable. *Kummer* v. *United States,* 148 F. (2d) 191 (C. C. A. 6, 1945); *U. S.* v. *Weekly Publications,* 144 F. (2d) 186 (C. C. A. 2); *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282, 290; *Central California Canneries* v. *Dunkley Co.,* 282 Fed. 406, 410 (C. C. A. 9).

Among the many decisions holding orders not final which do not determine plaintiff's rights and involve a continuation of the litigation are the following:

Frank Mercantile Corp. et al. v. *Prudential Ins. Co. of America,* 115 F. (2d) 496 (C. C. A. 3); *Drydock E. B. & B. R. Co.* v. *Peckham,* 261 Fed. 988 (C. C. A. 2); *Florini* v. *Stegner,* 82 Fed. (2d) 708 (C. C. A. 3) (orders granting a new trial made in the case in which the trial occurred); *Rodriguez* v. *Arosemena et al.,* 91 F. (2d) 219 (C. C. A. 5) (a judgment overruling a demurrer to the jurisdiction); *The Maria,* 67 F. (2d) 571 (C. C. A. 2) (denial of motion to dismiss libel for lack of admiralty jurisdiction); *Pearson* v. *Higgins,* 34 F. (2d) 27, 28 (C. C. A. 9) (order sustaining jurisdiction of the Bankruptcy Court in a summary proceeding); *Arthur* v. *Edmonds,* 66 F. (2d) 21 (C. C. A. 5); *Patten* v.

Cilley, 50 Fed. 337 (C. C. A. 1); *Klein* v. *Wilson*, 7 F. (2d) 777 (C. C. A. 3) (orders denying motions to remand on the ground that diversity was lacking); *Loufakis* v. *United States*, 75 F. (2d) 627 (C. C. A. 3) (order sustaining jurisdiction in a deportation case to compel witness to testify); see also *Bender* v. *Penn R. R. Co.*, 148 U. S. 502 and *McLish* v. *Roff*, 141 U. S. 661 (the first case holding not final an order denying a motion to remand and the second holding not final an order overruling a demurrer to the jurisdiction based on alleged lack of diversity).

In *Oneida Navigation Corp.* v. *W. & S. Job & Co., Inc.*, 252 U. S. 521, where the question was as to the jurisdiction in admiralty under Rule 56 of the Admiralty Rules over the claim contained in a petition impleading a third party, this Court said:

> "The petition to make W. & S. Job & Co. Inc., a party defendant was merely an incident in the progress of the case in the District Court."

The petition should be denied.

Respectfully submitted,

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JOHN L. GALEY,
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New York, N. Y., September 6, 1947.